-1656

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SUPREME COURT OF THE UNITED STATES

No. 72-1656

PAUL A. TENNENBAUM, et al.,

Petitioners,

vs.

ABRAHAM M. TENNENBAUM, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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SUPREME COURT OF THE UNITED STATES

No. _____

PAUL A. TENNENBAUM, et al.,

Petitioners,

vs.

ABRAHAM M. TENNENBAUM, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PROCEEDINGS BELOW

This petition for writ of certiorari is filed in order to obtain a review by this Court of *Paul A. Tennenbaum, et al.* v. *Abraham M. Tennenbaum, et al.*, decided by the Supreme Court of Ohio on March 15, 1973, and unreported.

The case originated in the Court of Common Pleas, Hamilton County, Ohio, which dismissed for lack of jurisdiction over the subject matter. This action was brought by beneficiaries of a testamentary trust to recover money damages from the trustee and two co-conspirators for a breach of the trustee's fiduciary duties through voting as director of a closely held corporation to dilute the value of stock held in the trust. The Common Pleas Courts of Ohio are the only courts of the state in which a trial by

jury as a matter of right is provided. The trial court's decision dismissing for lack of jurisdiction was affirmed by the Court of Appeals, First Appellate District, Hamilton County, Ohio, and appeal to the Supreme Court of Ohio was dismissed sua sponte for lack of substantial constitutional question.

These opinions and judgments and the complaint containing the jury demand are appended to this petition.

JURISDICTION

The order sought to be reviewed was entered on the 15th day of March, 1973 by the Supreme Court of Ohio. The case involves the question of whether or not the decision of the Ohio courts results in a denial of Petitioners' constitutional right to trial by jury. The question involves Petitioners' right to trial by jury claimed under the Seventh and Fourteenth Amendments of the Constitution of the United States.

The Supreme Court of the United States has jurisdiction to review this case under 28 U.S.C., Sec. 1257.

QUESTIONS PRESENTED

I. MAY OHIO APPLY A STATUTORY SCHEME APPORTIONING THE JURISDICTION AMONG ITS COURTS SO AS TO IMPAIR TRIAL BY JURY AS A MATTER OF RIGHT IN A SUIT AT COMMON LAW, WHERE THE VALUE IN CONTROVERSY EXCEEDS TWENTY DOLLARS?

II. IS A SUIT BY BENEFICIARIES UNDER A TESTAMENTARY TRUST TO RECOVER MONEY DAMAGES FROM THE TRUSTEE AND HIS CO-CONSPIRATORS FOR BREACH OF A FIDUCIARY DUTY OF THE TRUSTEE FOR THE BENEFIT OF

THE CO-CONSPIRATORS A SUIT AT COMMON LAW IN WHICH THE RIGHT OF TRIAL BY JURY IS PRESERVED BY THE SEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

III. HAS OHIO APPLIED ITS STATUTORY SCHEME IN VIOLATION OF THE SEVENTH AMENDMENT RIGHTS OF PETITIONERS HERE BY RESTRICTING JURISDICTION OF THIS CONTROVERSY TO THE PROBATE COURT WHERE TRIAL BY JURY AS A MATTER OF RIGHT IS NOT PROVIDED?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves construction and application of the Seventh Amendment of the Constitution of the United States, which reads as follows:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due pro-

cess of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The state statute which has been applied by the state courts is Section 2101.24, Ohio Revised Code, which reads as follows:

Except as otherwise provided by law, the probate court has jurisdiction:

(A) To take the proof of wills and to admit to record authenticated copies of wills executed, proved, and allowed in the courts of any other state, territory, or country; provided, that in case of the unavoidable absence of the probate judge, any judge of the court of common pleas may take proof of wills and approve bonds to be given, but the record of such acts must be preserved in the usual records of the probate court;

(B) To grant and revoke letters testamentary and of administration;

(C) To direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates;

(D) *To appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts;*

(E) To grant marriage licenses and licenses to ministers of the gospel to solemnize marriages;

(F) To make inquests respecting lunatics, insane persons, idiots, and deaf and dumb persons, subject to guardianship;

(G) To qualify assignees, appoint and qualify trustees and commissioners of insolvents, control their conduct, and settle their accounts;

(H) To authorize the sale of lands, equitable estates, or interests therein, and the assignments of

inchoate dower in such cases of sale, on petition by executors, administrators, and guardians;

(I) To authorize the completion of real contracts on petition of executors and administrators;

(J) To issue writs of habeas corpus and determine the validity of the caption and detention of the persons brought before it on such writs; the probate court may refer the petition to the common pleas court when the petitioner is detained on a charge, indictment, or conviction of having committed a felony or misdemeanor under the laws of the United States, this state, or under an ordinance of any political subdivision thereof;

(K) To construe wills;

(L) To render declaratory judgments;

(M) To direct and control the conduct of fiduciaries and settle their accounts;

(N) To authorize the sale or lease of any estate created by will if the estate is held in trust on petition by trustee;

(O) To terminate a testamentary trust in any case in which a court of equity may do so.

Such jurisdiction shall be exclusive in the probate court unless otherwise provided by law.

The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute.

The jurisdiction acquired by a probate court over a matter or proceeding is exclusive of that of any other probate court, except when otherwise provided by law. (Emphasis added)

The emphasized portions of the statute quoted immediately above were construed by the state courts to deny the

Court of Common Pleas of Hamilton County, Ohio the jurisdiction over the subject matter of the controversy of the present case. If only the Probate Court has jurisdiction over this controversy, the right to trial by jury will be limited by Section 2101.31, Ohio Revised Code, which reads as follows:

> All questions of fact shall be determined by the probate judge, unless he orders them tried by a jury, or referred, as provided in sections 2101.06 and 2101.07, and sections 2315.26 to 2315.37, inclusive, of the Revised Code.

Other provisions of the Ohio Constitution and Ohio Revised Code involved in the proceedings below but not directly relevant to the constitutional questions here are included in the appendix.

THE FACTS

The Controversy

The Petitioners are the children of Max C. Tennenbaum, deceased. Under the will of Max C. Tennenbaum, Abraham M. Tennenbaum, his brother, was named as trustee. For a great many years, the principal asset of the trust has been shares of stock in the Jake Tennenbaum Company.

On or about the 14th day of June, 1960, while Abraham M. Tennenbaum was serving as trustee under the will of Max C. Tennenbaum, with a duty of fiduciary responsibility for the Petitioners, Abraham M. Tennenbaum was also serving as attorney for the Respondents Dora and Joseph Kessel and as one of four directors of the Jake Tennenbaum Company, a family owned corporation. A short time prior, he had been executor and attorney for the

estate of his brother Moses Tennenbaum and attorney for Hattie M. Tennenbaum, widow of Moses Tennenbaum.

In June of 1960, there were three shareholders in the Jake Tennenbaum Company — the Respondent Dora Kessel, Hattie M. Tennenbaum and the Max C. Tennenbaum Trust, of which Respondent Abraham M. Tennenbaum was trustee and the Petitioners were beneficiaries. The directors of the company were Abraham M. Tennenbaum, Dora Kessel, Joseph Kessel, and Hattie M. Tennenbaum.

Hattie M. Tennenbaum offered to sell her shares of stock to the Jake Tennenbaum Company, as had been the family and corporate custom on the occasion of the deaths of prior shareholders who were members of the family.

At a directors' meeting in June of 1960, Dora Kessel and Joseph Kessel voted against the Jake Tennenbaum Company's purchase of the Hattie M. Tennenbaum stock. Hattie M. Tennenbaum voted in favor of the company's purchase of her stock and Abraham M. Tennenbaum, who was serving at attorney for Dora Kessel and had shortly before served as attorney for Hattie M. Tennenbaum and was trustee of the Max C. Tennenbaum Trust for the benefit of the Petitioners, voted with the Kessels against the purchase of the Hattie M. Tennenbaum stock. Thereafter, with the assistance of Respondent Abraham M. Tennenbaum, Dora Kessel negotiated the purchase of the Hattie M. Tennenbaum stock individually. The essential facts of this purchase were not discovered by Petitioners until June of 1970, several years after it had occurred. Suit was filed shortly thereafter.

The practical result of this joint action on the part of the Respondents was to prevent the trust, of which the Petitioners are beneficiaries, from maintaining its equality with other family shareholders, and to become a minority shareholder, in a close corporation. Indeed, had Abraham

M. Tennenbaum and Joseph Kessel and Dora Kessel not acted in concert the way they did in the corporate capacity of directors of the Jake Tennenbaum Company, the trust of which the Petitioners are beneficiaries would own equally one-half of the Jake Tennenbaum Company with Dora Kessel owning the other half. The practical result of this action of the Respondents in their corporate capacity was to dilute the trust interest in the corporation so as to cause the trust to be a one-third minority shareholder, which substantially reduced the value of the corpus of the trust and therefore substantially reduced the value of the Petitioners' interest in the trust.

The result of this concerted action on the part of Abraham Tennenbaum, who was representing several conflicting interests at the time, and on the part of Dora and Joseph Kessel, had been to unjustly enrich Joseph and Dora Kessel and to deplete the assets of the Petitioners.

This is an action for money to recover for the damages suffered by the Petitioners as a result of a concerted action or conspiracy between a fiduciary and nonfiduciaries to bring about a breach of fiduciary responsibility for the benefit of the nonfiducaries. The breach of fiduciary responsibility was not a violation of a technical probate statute, did not relate to the accounts of trustee, and was not supervised, directed or controlled by the Probate Court, but it was a violation of a duty of loyalty which the fiduciary had to the beneficaries. As a result of the joint actions of the Respondents, the Respondents Dora Kessel and Joseph Kessel have profitted at the expense of Petitioners who were damaged.

The State Court Action

This action was commenced in the Court of Common Pleas of Hamilton County, Ohio on August 14, 1970. That

action on the part of Petitioners, as plaintiffs, sought compensatory damages of approximately $142,000.00 against the trustee and his co-conspirators on the controversy set forth above. In their complaint, plaintiffs demanded a jury trial. A motion by Respondents, as defendants, for dismissal for failure to state a claim upon which relief can be granted was denied by that court. Thereafter, a suggestion of lack of jurisdiction over the subject matter was filed and ultimately the action was dismissed on that ground. In dismissing the action, the trial court relied upon Section 2101.24, Ohio Revised Code, as conveying exclusive jurisdiction upon the Probate Court in causes of action of this type.

The plaintiffs raised the question of their right to trial by jury in a "Memorandum on Jurisdiction" filed with the Common Pleas Court on the 10th day of May, 1972. That memorandum put forth at page 3 thereof the following position:

> "Since this is an action for money under both the Constitution of the United States (Amendment No. VII) and the Constitution of Ohio, Article I, Section 5, the Plaintiffs have a right to a jury trial which has been demanded. If the matter is exclusively held to fall within the scope of the Probate Court's jurisdiction, then the Plaintiffs are denied their right to a jury trial, this interferes with the most fundamental constitutional right of the Plaintiffs."

This position of the impairment of the right to trial by jury was asserted in oral argument before that court on May 18, 1972.

The trial court concluded in its opinion that this case was not an action for money damages, and cited as its authority the case of *Starr* v. *Rupp*, 421 F. 2d 999 (6th Cir. 1970), and *Princess Lida of Thurn* v. *Thompson*, 305 U. S. 456 (1939).

On appeal to the Court of Appeals of the First Appellate District of Hamilton County, Ohio, the plaintiffs raised as their first assignment of error the following:

> "The Trial Court erred in dismissing the case against individual defendants and a defendant fiduciary in an action to recover money for the unjust enrichment of the nonfiduciary defendants based upon a challenge to the court's jurisdiction by the fiduciary-defendant in reliance upon *Starr* v. *Rupp,* 24 Ohio Misc. 151, 53 Ohio Op. 2d 169, which held that a federal court does not have jurisdiction to supervise a fiduciary in the completion of his responsibilities, without regard to the fact or discussion of the fact that there is nothing in the *Starr* v. *Rupp* case that suggests the Trial Court lacks jurisdiction over nonfiduciaries in the civil action for money."

In response to this, the Court of Appeals held at pages 1 and 2 of its opinion the following:

> "Upon consideration thereof, the Court finds the first assignment of error is not well taken for the trial court ruled properly that unless and until there was a finding in the proper forum, that is, the Probate Division of the Common Pleas Court, that the trustee was guilty of some act in violation of his duties as such trustee, there was no cause of action, by way of conspiracy, against the other defendants-appellees."

The plaintiffs further asserted the following as their fourth assignment of error:

> "In this action to recover money, the Trial Court erred in holding that it did not have jurisdiction over the subject matter and that the only court where the action could be brought is the Probate Court, which has the practical result of denying the plaintiffs a right to a jury trial in an action for money in viola-

tion of the Constitution of the United States, Amendment VII and of the Constitution of Ohio, Article I, Section 5."

In response to this, the Court of Appeals found at page 2 of its opinion as follows:

> "The fourth assignment of error is not well taken for, until a cause of action is established as suggested in ruling on the first assignment of error, the appellant is precluded from proceeding with an action for money."

The plaintiffs appealed from the Court of Appeals to the Supreme Court of Ohio on the following propositions of the law:

Proposition of Law No. 1

An action for money damages as a result of concerted action or conspiracy between a fiduciary trustee under a will and nonfiduciaries to bring about a breach of fiduciary responsibility for the benefit of nonfiducaries is a civil suit at common law in which trial by jury as a matter of right is preserved under the Seventh Amendment of the Constitution of the United States and Article I, Section 5 of the Ohio Constitution.

Proposition of Law No. 2

Original jurisdiction over all justiciable matters which are beyond the jurisdiction of the county courts is conferred on the courts of common pleas under Article IV, Section 4 (B), Ohio Constitution, through Section 2305.01, Ohio Revised Code, and this jurisdiction covers civil suits at common law in which trial by jury as a matter of right is preserved by the Ohio and United States Constitutions.

Proposition of Law No. 3

The jurisdiction of the probate division of the common pleas courts, as provided in Article IV, Section 4 (C), Ohio Constitution, and Section 2101.24, Ohio Revised Code, does not extend to the point of excluding the jurisdiction of the courts of common pleas over cases where trial by jury is preserved as a matter of Constitutional right, since jury trial as of right in the probate division is excluded by statute (Section 2101.31, Ohio Revised Code).

The defendants opposed jurisdiction of the Supreme Court of Ohio in their memorandum which set forth the following counter-propositions:

Proposition of Law No. 1

A. An action against a Probate Court appointed fiduciary for alleged breach of his fiduciary duties is not a case in which trial by jury is preserved.

B. The constitutional right to trial by jury is not properly raised in an appeal from a dismissal for want of jurisdiction by the Court of Common Pleas in an action by beneficiaries of a testamentary trust against the trustee.

Proposition of Law No. 2

A. The Probate Court has exclusive jurisdiction of an action against a testamentary trustee for violation of his fiduciary duties.

B. Until the Probate Court determines that the trustee mishandled the trust, no cause of action is stated against the non-fiduciary defendants.

These propositions are set forth in the tables of contents of the respective memoranda in support of and in opposition to the jurisdition of the Ohio Supreme Court.

The Supreme Court of Ohio dismissed the appeal sua sponte on the grounds that no substantial constitutional question was involved. The plaintiffs now petition to this Court for writ of certiorari in regard to the constitutional question of their right to trial by jury in the controversy involved here.

REASONS TO ALLOW WRIT

The Seventh Amendment

The Seventh Amendment right to trial by jury in civil actions has not yet been specifically held by this Court to be applicable to the states under the Fourteenth Amendment. In this regard, the Seventh Amendment is almost singularly distinguishable from the other amendments which constitute the Bill of Rights of our Federal Constitution.

At the heart of the questions here presented to this Court is an apparent conflict over whether the right to trial by jury in civil cases is included in the fundamental elements of due process applied to the states by the Fourteenth Amendment. On the one hand, it is the widespread opinion among the state courts that the substance of the Seventh Amendment is not a fundamental element of due process and is applicable only to the federal courts. *Hiatt* v. *Yergin*, 284 N. E. 2d 834 (Ind. 1972), *Williams* v. *Williams*, 13 N. C. App. 468, 186 S. E. 2d 210 (1972), *Butler* v. *Claxton*, 221 Ga. 620, 146 S. E. 2d 763 (1966), *Stephenson* v. *State*, 119 Ohio St. 349, 164 N. E. 359 (1928) (a Sixth Amendment case). These cases cling to early decisions by this Court which were handed down before the due process concepts of the Fourteenth Amendment were fully developed. *Edwards* v. *Elliott*, 88 U. S.

(21 Wall) 532 (1874), *Pearson* v. *Yewdall*, 95 U. S. (5 Otto) 294 (1877), *Fay* v. *New York*, 332 U. S. 261 (1947).

On the other hand, however, the decisions of this Court handed down over the past two decades have almost without exception been aimed in the direction of applying the rights and freedoms established in the Bill of Rights to the states through the due process clause of the Fourteenth Amendment of the Constitution. For example:

The right to trial by jury in criminal cases as provided in the Sixth Amendment of the Constitution of the United States has been held to be a fundamental element of due process applicable to the states under the Fourteenth Amendment. In the case of *Duncan* v. *Louisiana*, 391 U. S. 145 at 153-154 (1968), the Court stated that:

> "Even such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court."

Other constitutional guarantees of the Sixth Amendment have been held applicable to the states under the due process clause of the Fourteenth Amendment. The right to be represented by counsel, and of indigents to have court-appointed counsel, has been held binding on the states under *Herman* v. *Claudy*, 350 U. S. 116 (1956), *Gideon* v. *Wainwright*, 372 U. S. 375 (1963), *Argersinger* v. *Hamlin*, 407 U. S. 25, 32 L.Ed.2d 530, 92 Sup. Ct. 2006 (1972). The right of criminal defendants to confront witnesses has been applied in *Pointer* v. *Texas*, 380 U. S. 400 (1965) and *Douglas* v. *Alabama*, 380 U. S. 415 (1965). So has been applied the right to a speedy trial. *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967). The right to compulsory process has been held applicable to the states in *Washington* v. *Texas*, 388 U. S. 14 (1967).

The constitutional safeguards embodied in the Fifth Amendment have been made applicable to the states under the Fourteenth Amendment. The privilege against self-incrimination applies to the states. *Malloy* v. *Hogan,* 378 U. S. 1 (1964), *Pointer* v. *Texas,* 380 U. S. 400 (1965). The prohibition against double jeopardy is binding upon the states. *Benton* v. *Maryland,* 395 U. S. 784 (1969). Also, the right to appellate review for indigents has been held applicable in *Burns* v. *Ohio,* 360 U. S. 252 (1959), the right to be tried for contempt before a separate charge in *Mayberry* v. *Pennsylvania,* 400 U. S. 455 (1971), and freedom from entrapment in *Cox* v. *Louisiana,* 379 U. S. 559 (1965).

The Eighth Amendment prohibition against cruel and unusual punishment has been held applicable in *Robinson* v. *California,* 370 U. S. 660 (1962).

The Fourth Amendment's safeguard against unreasonable searches and seizures has been held applicable to the states in *Wolf* v. *Colorado,* 338 U. S. 25 (1949).

The right of privacy has been held guaranteed by the Ninth Amendment (although not included in the "Bill of Rights") and applicable to the states under the Fourteenth Amendment. *Griswold* v. *Connecticut,* 381 U. S. 479 (1965).

There is abundance of authority from this Court applying the rights of the First Amendment to the states under the Fourteenth Amendment. *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940). The more recent cases upholding this right in specific areas are the following.

Freedom of religion — *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church,* 344 U. S. 94 (1952), *Niemotko* v. *Maryland,* 340 U. S. 268 (1950);

Freedom of speech and of the press — *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495 (1942), *Butler* v. *Michigan,*

352 U. S. 380 (1957), *Kingsley Int'l Picture Corp.* v. *Regents of University of New York*, 360 U. S. 684 (1959):

Freedom of association — *Brown* v. *Louisiana*, 383 U. S. 131 (1966), *NAACP* v. *State ex rel. Patterson*, 357 U. S. 449 (1958), *NAACP* v. *Button*, 371 U. S. 415 (1963);

. Right to vote — *Westberry* v. *Sanders*, 376 U. S. 1 (1964).

But every implication of the Bill of Rights to restrictions upon Congress and the federal courts does not necessarily constitute an element of fundamental due process of law. This Court has thus proceeded cautiously to explicitly spell out those specific provisions of the Bill of Rights which are to be applicable to the states through the Fourteenth Amendment. Wholesale incorporation of the Bill of Rights into the Fourteenth Amendment has never been held by a majority of this Court. *Malloy* v. *Hogan*, 378 U. S. 1 (1964). The states have proceeded under the assumption that, unless this Court has specifically held a provision of the Bill of Rights or any one of the amendments thereof to be applicable to the states, then the provision does not apply to the states.

The Seventh Amendment has lacked such specific application.

Ohio's Commitment to Trial by Jury

Ohio purports to guarantee the right to trial by jury. The present version of Article I, Section 5 of the Ohio Constitution, as amended in 1912, provides that:

> "The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." Ohio Const. Art. I, § 5 (1851).

This provision as it appeared in the Ohio Constitution of 1851 was identical to the provision of Article VIII, Section 8 of the Ohio Constitution of 1802, which provided: "The right of trial by jury shall be inviolate." This has been construed by the courts of Ohio to grant the right to trial by jury in civil cases in which the right to trial by jury existed at common law at the time of the adoption of the Constitution of 1802. *Mason* v. *State*, 58 Ohio St. 30, 50 N. E. 6 (1898).

Immediately prior to 1802, Ohio was part of the Northwest Territory and the right to trial by jury was governed by the Seventh Amendment of the Constitution of the United States applicable to territories of the United States. *Webster* v. *Reid*, 52 U. S. (11 HOW) 437 (1850), *Kennon* v. *Gilmer*, 131 U. S. 22 (1888), *Thompson* v. *Utah*, 170 U. S. 343 (1897).

Ohio courts interpret the Ohio Constitution's guarantee as coextensive with the Seventh Amendment right of the U. S. Constitution. *Work* v. *State*, 2 Ohio St. 296 (1853), *Magill* v. *State*, 34 Ohio St. 228 (1878), *Gibbs* v. *Gerard*, 88 Ohio St. 34 (1913).

The question thus arises, regardless of whether or not the Seventh Amendment is applicable to the states under the Fourteenth Amendment: May Ohio impair the right to trial by jury once it has sought to guarantee that right to the people? This question was raised in other cases involving issues within the scope of the Fourteenth Amendment. This Court in *Beck* v. *Washington*, 369 U. S. 541 (1962), raised the question thus by way of dictum: "It may be that the due process clause of the Fourteenth Amendment requires the state, having once resorted to a grand jury, to furnish an unbiased grand jury." 369 U. S. at 456. The Court there found it unnecessary to determine that question, however. In *Williams* v. *Rhodes*, 393 U. S. 23 (1968), a case challenging the Ohio statutory scheme

as it related to the election of presidential electors, Mr. Justice Douglas noted at 393 U. S. 38 of his separate concurring opinion that it was unnecessary for the Court to decide whether there is a constitutional right to vote for presidential electors. He reasoned thus:

> "For in this case Ohio has already provided for them to be chosen by right of popular suffrage. Having done so, the question is whether Ohio may encumber that right with conditions of the character imposed here."

Whether 1) the Seventh Amendment is held to be applicable to the states, or 2) the theory is to be adopted that Ohio — having purported to constitutionally guarantee the right to trial by jury — may not now impair that right through procedural obstructions, the question which would remain to be decided is whether or not Ohio is employing its jurisdictional statutory scheme in this case to impair that right to trial by jury.

While Ohio purports to guarantee the right to trial by jury, it is submitted that, in the present case, Ohio is structuring its jurisdictional scheme to apportion the subject matter of a controversy throughout its court system in a manner which impairs this right to trial by jury.

Common Law Requirement of Jury Trial

The Supreme Court of Ohio has recognized that at common law, the right to trial by jury would be required in cases such as this one. The Court in *Taylor* v. *Brown*, 92 Ohio St. 287, 110 N. E. 738 (1915), in paragraph 2 of the syllabus (the syllabus of an Ohio Supreme Court opinion is the law in Ohio), states:

> "Where recovery is sought against a fiduciary for fraud and deceit, in which a specific amount is claimed, and where no accounting is asked or required, the fact that

> the defendant occupies a fiduciary relation does not stamp the action as equitable; and in such a case, if no other remedy cognizable in equity is asked and needed to give full and adequate relief, the action is legal and not equitable, is for money only and triable by a jury."

Whether under the Seventh Amendment of the United States Constitution or Ohio's own constitutional commitment, the present action by beneficiaries against a trustee and co-conspirators profitting from his breach of loyalty is an action at common law in which the right to trial by jury existed in 1802 and 1791.

Ohio's Impairment of the Right

The state trial court below categorically determined that it was without jurisdiction over the subject matter of the claims against either the trustee or his co-conspirators, by virtue of the state statute which it construed as invoking exclusive jurisdiction in the Probate Court, "To appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts." Section 2101.24 (D), Ohio Revised Code.

The only basis for fitting the controversy in question into that portion of the jurisdictional statute would be to regard one element of the claim for damages, namely the trustee's breach of fiduciary duty in voting stock within the trust contrary to the interest of the beneficiaries, as something that *could have been* controlled by the Probate Court had the trustee brought it to the court's attention and asked for a ruling thereon at the time of his actions.

The opinion of the First Appellate District Court of Appeals of Ohio in this case apparently holds that the portion of the controversy which relates to the breach of the duty of the trustee must be first determined by the

Probate Court before an action would lie to recover money damages. Whether the factual determination concerning the basic liability of the trustee may be severed from an action for money damages and tried without a jury is a fundamental question of due process to be determined here.

It is extremely important here to note the implications and effects of the holding of the Ohio Court of Appeals below. If Section 2101.24, Ohio Revised Code, is pertinent, it would be by virtue of a duty conferred by that statute upon the Probate Court to direct and control the conduct of the trustee in the first instance. The holding of the Court of Appeals will thus require that Petitioners may obtain relief in Ohio courts only upon a ruling that a wrong has been committed from the Probate Court, which in the first instance had the duty to supervise, control and direct the very wrong complained of. Under these circumstances, the need for trial by jury as fundamental to due process is most compelling.

SUMMARY

By the jurisdictional rulings in the state courts below, Ohio is precluding the right to trial by jury over the essential facts which underly the issue of liability in this action to recover money damages in violation of Petitioners' right to due process guaranteed under the Seventh and Fourteenth Amendments of the Constitution of the United States. The writ should be granted.

Respectfully,

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Of Counsel:

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APPENDIX

Tennenbaum et al. v. Tennenbaum et al.
Supreme Court of Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, City of Columbus. } 1973 TERM To wit: March 15, 1973

No. 73-96

PAUL A. TENNENBAUM, ET AL.,
Appellants,

vs.

ABRAHAM M. TENNENBAUM, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS
For Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .... day of ..... 19..

..... Clerk

..... Deputy

THE SUPREME COURT OF THE STATE OF OHIO

1973 TERM
To wit: March 15, 1973

No. 73-96

THE STATE OF OHIO,
City of Columbus.

PAUL A. TENNENBAUM, ET AL.,
Appellants,

vs.

ABRAHAM M. TENNENBAUM, ET AL.,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS For Hamilton County TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Robert E. Manley.

I, Thomas L. Stratzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .. day of ..... 19..

.... Clerk

..... .Deputy

Tennenbaum et al. v. Tennenbaum et al.
Court of Appeals, Hamilton County, Ohio

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-72247

PAUL A. TENNENBAUM,
JOSEPH S. TENNENBAUM
and
RAISA TENNENBAUM,
Plaintiffs-Appellants,

vs.

ABRAHAM M. TENNENBAUM;
ABRAHAM M. TENNENBAUM,
Trustee U/W of Max C. Tennenbaum, Deceased,
and
JOSEPH KESSEL and DORA KESSEL,
Defendants-Appellees.

DECISION

December 18, 1972

Mr. Robert E. Manley, for Plaintiffs-Appellants,

Mr. Leonard L. Lipschutz for Defendant-Appellee, Abra-

ham M. Tennenbaum, individually and as Trustee U/W of Max C. Tennenbaum, deceased,

Mr. Melvin J. Kessel for Defendants-Appellees, Joseph and Dora Kessel.

PER CURIAM.

This cause came on to be heard upon appeal on the transcript of the docket and journal entries and the original papers and pleadings in the Common Pleas Court of Hamilton County, Ohio, and on the assignments of error, the briefs and arguments of counsel.

Upon consideration thereof, the Court finds the first assignment of error is not well taken for the trial court ruled properly that unless and until there was a finding in the proper forum, that is, the Probate Division of the Common Pleas Court, that the trustee was guilty of some act in violation of his duties as such trustee, there was no cause of action, by way of conspiracy, against the other defendants-appellees.

The second assignment of error is not well taken for the code section which basically determines the question of jurisdiction is Section 2101.24 (D) and not the general language of the Section of the Ohio Constitution used therein.

The third assignment of error is likewise not well taken for the same code section referred to in ruling on the second assignment of error is controlling and not the more general wording in Ohio Revised Code Section 2305.01.

The fourth assignment of error is not well taken for, until a cause of action is established as suggested in ruling on the first assignment of error, the appellant is precluded from proceeding with an action for money.

The fifth assignment of error is repetitive of the pre-

ceding assignments of error and is not well taken for the reasons advanced hereinabove.

The sixth assignment of error fails for the same reason stated in ruling on the first assignment of error and the seventh assignment of error is not well taken for the same reason.

The judgment of the Common Pleas Court of Hamilton County, Ohio, is affirmed.

HESS, P. J., YOUNG and SHANNON, J. J.

COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

MINUTE 506

Common Pleas Court
No. A-250403

NO. C-72247

PAUL A. TENNENBAUM,
JOSEPH S. TENNENBAUM and
RAISA TENNENBAUM,
Appellants,

vs.

ABRAHAM M. TENNENBAUM;

ABRAHAM M. TENNENBAUM,
TRUSTEE U/W of Max C. Tennenbaum, Deceased,

and

JOSEPH KESSEL and DORA KESSEL,
Appellees.

JUDGMENT ENTRY

To the Clerk:

This judgment is approved. Enter upon the journal of the court.

/s/ Hess, P.J.
Presiding Judge

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Common Pleas Court of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Common Pleas Court of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Common Pleas Court of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the appellants, by his counsel, excepts.

Tennenbaum et al. v. Tennenbaum et al.
Court of Common Pleas, Hamilton County, Ohio

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-250403

PAUL A. TENNENBAUM,
3300 Flamingo Drive,
Miami Beach, Florida 33140,

JOSEPH S. TENNENBAUM,
2804 Cortelyou Place,
Cincinnati, Ohio 45213,

RAISA BENJAMIN,
5901 North Sheridan,
Chicago, Illinois 60626,

Plaintiffs,

vs.

ABRAHAM M. TENNENBAUM,
833 East Elm Street,
Springfield, Missouri,

ABRAHAM M. TENNENBAUM,
Trustee U/W of Max C. Tennenbaum, deceased,
833 East Elm Street,
Springfield, Missouri,

JOSEPH KESSEL,
1265 Paddock Hills Road,
Cincinnati, Ohio,

DORA KESSEL,
1265 Paddock Hills Road,
Cincinnati, Ohio,

Defendants.

AMENDED COMPLAINT

(Filed September 23, 1970)

COUNT ONE

1. Defendant, Abraham M. Tennenbaum is and was at all times mentioned herein the duly appointed, qualified and acting Trustee under the will of Max C. Tennenbaum, deceased. Plaintiffs are beneficiaries of the said trust.

2. Defendant, Abraham M. Tennenbaum on June 14, 1960, was attorney for defendants Dora and Joseph Kessel and director of the Jake Tennenbaum Company, a corporation, and a short time prior thereto had been executor and attorney for the Estate of Moses Tennenbaum and attorney for Hattie M. Tennenbaum widow of Moses Tennenbaum.

3. On or about said date said defendant, Abraham M. Tennenbaum acting as a Director of the Jake Tennenbaum Company, voted with two of three other directors not to accept the offer of Mattie M. Tennenbaum, to sell her shares of stock in the company to the company and negotiated a purchase by Dora Kessel of Hattie M. Tennenbaum's stock resulting in placing the trust in the position of a one-third minority stockholder holding shares in the company with a value that was thereby reduced.

4. Seven years prior to June 18, 1970 Abraham M. Tennenbaum departed from the State of Ohio, was absent therefrom during the said period and is now a resident of Missouri.

5. The essential facts alleged herein did not become known to plaintiffs until June 18, 1970.

COUNT TWO

1. Plaintiffs incorporate by reference all of the allegations of Count One as if fully restated herein and say that defendants, Abraham M. Tennenbaum, Dora Kessel and Joseph Kessel acted in concert in conspiring to deprive plaintiffs of the truee value of the stock held in trust for their benefit and in placing Dora Kessel in the position of controlling stockholder with ownership of two-thirds of the oustanding stock of the company.

COUNT THREE

1. Plaintiffs incorporate by reference all of the allegations of Counts One and Two as if fully restated herein and say that as the result of the joint and several actions of the defendants, Dora Kessel was unjustly enriched in obtaining control of the company to the detriment of the plaintiffs and the trust of which they are beneficiaries.

WHEREFORE, plaintiffs demand judgment against defendants for the sum of One Hundred Forty-one Thousand Seven Hundred One and 00/100 Dollars ($141,701.00) and for judgment for punitive damages in the sum of Five Hundred Thousand and 00/100 Dollars ($500,000.00) and for their costs herein expended.

BEIRNE, WIRTHLIN & MANLEY
By /s/ ROBERT E. MANLEY
Attorneys for Plaintiffs
3312 Carew Tower
Cincinnati, Ohio 45202

Plaintiffs request a jury of twelve to try all issues of fact herein.

BEIRNE, WIRTHLIN & MANLEY
By /s/ ROBERT E. MANLEY

COUNTY OF HAMILTON

Gilbert Bettman
Judge

Court of Common Pleas
For the First Judicial District of Ohio
Cincinnati, Ohio 45202

[Letterhead]

April 21, 1972

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Re: Paul A. Tennenbaum, et al v. Abraham M. Tennenbaum, et al No. A-250403

Gentlemen:

The above matter was submitted to the Court on defendant's suggestion of lack of jurisdiction in this Court. This the Court will construe as a motion to dismiss for lack of jurisdiction under Rule 12.

From a reading of the amended complaint it would appear that the gravamen of the charge is that the defen-

dant, Abraham M. Tennenbaum, while acting as trustee under the will of Max C. Tennenbaum acted improperly in his handling of the assets of the trust. We do not see how the matter can be construed otherwise than within the jurisdiction of the Probate Court under O.R.C. 2101.24 and consider the case of *Starr* v. *Rupp*, 24 O. Misc. 151, 53 O.O. 2d 169 as directly in point. This same principle is enunciated in *Princess Lida of Thurn* v. *Thompson*, 305 U. S. 456.

O.R.C. 2101.24 (D) provides that the Probate Court has jurisdiction "to appoint and remove guardians and testamentary trustees, direct and control their conduct, and settle their accounts;" and provides further that "such jurisdiction shall be exclusive in the probate court unless otherwise provided by law. The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."

It would seem under these parts of O.R.C. 2101.24 that Mr. Tennenbaum's alleged failure to protect the value of shares of stock owned by the trust by purchasing the additional interest so as to preserve a 50% ownership is specifically under the Probate Court's authority to direct and control his conduct and settle his accounts.

The case of In Re Estate of Porter, 17 O. Misc. 136, 46 O.O. 2d 180 is completely consistent with the above. As stated by the Court there: "The plenary power situated in the Probate Court is a complete and total power to determine issues concerning the administration of an estate."

Plaintiffs contend here that this is an action in personam for money damages. This position would not stand analysis. The same position was taken in *Starr* v. *Rupp* and it would serve no purpose to repeat here the Court's analysis of this contention.

The Court did not have the benefit of oral argument on this matter which was submitted simply on briefs and therefore may not clearly understand all the facts. If counsel feels a hearing is necessary to clarify the issue the Court is willing to conduct one.

On the basis of the amended complaint and the briefs of counsel the Court is of the opinion that the suggestion of lack of jurisdiction is well taken and should be considered as a motion to dismiss and granted. Entry may be presented accordingly.

Sincerely,

/s/ Gilbert Bettman
Gilbert Bettman

GB:nr

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

PAUL A. TENNENBAUM,
JOSEPH S. TENNENBAUM and
RAISA BENJAMIN,

Plaintiffs,

vs.

ABRAHAM M. TENNENBAUM,
and JOSEPH and DORA KESSEL,

Defendants.

ENTERED JUN 23 1972 IMAGE 65
/s/ BETTMAN, J.

NO. A-250403

ENTRY OF DISMISSAL

This matter coming on to be heard on the suggestion of lack of jurisdiction which the Court construed as a motion to dismiss for lack of jurisdiction under Rule 12 of the Ohio Rules of Civil Procedure, and on the briefs filed herein, the Court finds that the motion should be granted for lack of jurisdiction and the amended complaint is hereby dismissed at plaintiffs costs. To which the plaintiffs except.

/s/ Robert E. Manley,
ATTORNEY FOR PLAINTIFFS

/s/ Leonard L. Lipschutz
ATTORNEY FOR DEFENDANT
ABRAHAM M. TENNENBAUM

/s/ Melvin J. Kessel
ATTORNEY FOR DEFENDANTS
DORA KESSEL AND JOSEPH KESSEL

CONSTITUTIONAL PROVISIONS AND STATUTES

Ohio Constitution, Article IV, Section 4(B)

(B) The courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

Ohio Constitution, Article IV, Section 4(C)

(C) Unless otherwise provided by law, there shall be a probate division of the courts of common pleas, and judges shall be elected specifically to such probate division and shall be empowered to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts. (Adopted May 7, 1968. Former § 4 repealed. The above provisions are analogous to former Article IV, §§ 3, 4.)

Section 2305.01, Ohio Revised Code

Jurisdiction in civil cases; trial transfer.

The court of common pleas has original jurisdiction in all civil cases where the sum or matter on dispute exceeds the exclusive original jurisdiction of county courts; and appellate jurisdiction from the decisions of boards of county commissioners, county courts, and other inferior courts in the proper county, in all civil cases, subject to the regulations provided by law.

28 U.S.C., Sec. 1257

State courts — Appeal — Certiorari.

Final judgments or decrees rendered by the highest

court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

FILE COPY

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SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1656

PAUL A. TENNENBAUM, et al.,

Petitioners,

vs.

ABRAHAM M. TENNENBAUM, et al.,

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED

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II. IS THE RIGHT TO TRIAL BY JURY PROPERLY RAISED IN AN APPEAL FROM A DISMISSAL FOR WANT OF JURISDICTION BY THE COURT OF COMMON PLEAS, WHERE RIGHT TO TRIAL BY JURY IS AVAILABLE IN PROBATE COURT?

III. IS THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES APPLICABLE TO CIVIL SUITS IN STATE COURTS?

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1656

PAUL A. TENNENBAUM, et al.,

Petitioners,

vs.

ABRAHAM M. TENNENBAUM, et al.,

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REASONS TO DENY WRIT

Right to Jury Trial in Ohio at Common Law

In the case of *Brown, Executor, etc.* v. *Reed*, 56 Ohio St. 264, 46 N.E. 982, the question of the right to trial by jury was raised in the Huron County Probate Court in connection with exceptions to an executor's account alleging that the executor failed to sell assets of the estate for a sufficient amount and to charge him for the difference between what he sold it for and its true value.

The Supreme Court stated in the *Brown* case, 56 Ohio St. at Page 270:

> "It is said that the circuit court erred because of the summary determination of a question of the character of this on exception to the executor's account

> denies his constitutional right to the intervention of a jury. But the constitution preserves the right to trial by jury in those cases only where it existed previously to its adoption. Both before and since the adoption of the constitution it has been usual to call executors and other trustees to account in courts having equity or probate jurisdiction, and without the intervention of a jury to determine any question affecting the state of their accounts.
>
> The eighth section of the fourth article of the constitution ordains that 'the probate court shall have jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlements of the accounts of executors, administrators, etc. It is expressly provided in section 6400 of the Revised Statutes that 'all questions, except those arising in criminal actions and proceedings, unless otherwise provided by law, shall be determined by the probate judge, unless, in his discretion, he shall order the same to be tried by a jury or referred.' "

Therefore, it is clear that there is no constitutional right to trial by jury under the Ohio Constitution in this type of case.

As stated in *Belding* v. *State ex rel Heifner,* 121 Ohio St. 393, 169 N.E. 301:

> "1. Section 5 of Article I of the Constitution of Ohio only guarantees the right of trial by jury in those cases where it existed prior to its adoption."

The case of *Taylor* v. *Brown,* 92 O.S. 287, 110 N.E. 738, cited at page 18 of Petitioners' brief, was not a case involving fiduciary appointment by the Probate Court and was a suit between partners where several partners sued for damages for fraud and deceit against another partner who held title to certain land in trust for the partnership. That case is not in point on the question of the right to

jury trial in a case involving the actions of a fiduciary appointed by the Probate Court, with respect to his duties as fiduciary.

Procedural Question On Appeal

The Ohio Constitution provides for a Probate Division and the Legislature may determine the exclusive jurisdiction of that Division. The Probate Court has the right to grant a trial by jury (Section 2101.31, Ohio Revised Code).

Until petitioners have been denied trial by jury in Probate Court, they have not been deprived.

It is submitted that the Probate Court is the proper place to raise this issue, and it can be raised in the case now pending filed by Petitioners against Respondents in the Hamilton County, Ohio, Probate Court.

Applicability of Seventh Amendment

In *Gustafson* v. *Peck,* 216 F. Supp. 370 (N.D. Iowa 1963), which held that federal courts have exclusive jurisdiction of actions under the Tort Claims Act, plaintiffs had argued improper denial of jury trial. The court stated, at page 371, that the Seventh "does not operate to guarantee a right to a jury trial in the State Court but applies only to the Courts of the United States."

Iacaponi v. *New Amsterdam Casualty Co.,* 258 F. Supp. 880 (W.D. Pa. 1966), affirmed 379 F. 2d 311, cert. denied 389 U.S. 1054, allegedly involved fraud in connection with a workman's compensation agreement. Among other things, plaintiff claimed that he was denied due process by technical Pennsylvania procedural rules (regarding res judicata) and that he was denied trial by jury. The court declared in 258 F. Supp. at page 884:

> "A litigant in a state court civil action has no constitutional right to a trial by jury under the Seventh Amendment or under the due process clause of the Fourteenth Amendment.
>
> A State may establish its own procedures and practices with regard to the conduct of civil litigation including the right of trial by jury."

The argument, rejected in *Iacaponi,* that procedural rules served to violate plaintiff's due process rights is similar to Petitioner's "statutory scheme" argument (Brief for Petitioner, Question I. and III., pp. 2-3).

In *Melancon* v. *McKeithen,* 345 F. Supp. 1025 (E.D. La. 1972), Affirmed 93 S.C. 289-90, plaintiffs specifically sought a holding that the Seventh Amendment applies to civil actions in state courts through the Fourteenth Amendment. In a comprehensive opinion, taking full note of the Supreme Court's responsiveness to evolving standards of due process, the District Court held in 345 F. Supp at page 1027 that the Seventh is not applicable to state courts stating jury trials in civil cases "are not so fundamental to the American system of justice as to be required of state courts by due process."

SUMMARY

There is no constitutional right to a jury trial under the Ohio Constitution since right to trial by jury in a suit against an executor or testamentary trustee for violation of his duties did not exist at common law.

Even if such right does exist, it can be granted in the Probate Court which has the right to grant same and has not yet been denied. Therefore, the appeal is premature.

Moreover, the Seventh Amendment right to trial by jury does not apply to civil actions in State Courts.

Therefore the writ should be denied.

Respectfully submitted,

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